No. 42725-7-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

Vs.

ROBERT GARCIA, JR.

Appellant.

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

Cause No. 11-1-00160-3

OPENING BRIEF OF APPELLANT

CASEY M. ARBENZ
WSB #40581

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Table of Contents

TABLE OF AUTHORITIES

STATE CASES

STATUTES

RULES

I. ASSIGNMENTS OF ERROR

1. The trial court erred when it allowed the introduction of uncharged prior sex offense evidence to be admitted under RCW 10.58.090.

2. The trial court erred when it failed to properly analyze ER 404(b) and allowed the State to improperly introduce inadmissible character evidence – in the form of uncharged sexual misconduct allegations – against Mr. Garcia.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it allowed the introduction of uncharged prior sex offense evidence to be admitted under RCW 10.58.090. (Assignments of Error # 1)

2. Whether the trial court erred when it failed to properly analyze ER 404(b) and allowed the State to improperly introduce inadmissible character evidence – in the form of uncharged sexual misconduct allegations – against Mr. Garcia. (Assignments of Error # 2).

III. STATEMENT OF THE CASE

A. Procedural History

On January 10, 2011, Mr. Robert Garcia, Jr., Petitioner herein, was charged with one count of rape of a child in the first degree and two counts of child molestation in the first degree in Pierce County Superior Court. CP 1-2.

On August 1, 2011, a trial commenced before the Honorable Vicki Hogan. RP 1 (8/1/2011). Outside the presence of the jury, the State moved to admit evidence of alleged prior sex offenses under RCW 10.58.090 and ER 404(b). RP 24-33 (8/1/2011). Specifically, the State moved to present evidence that Mr. Garcia had engaged in prior uncharged sexual misconduct with his daughter, Lorraine. Id.

Counsel for Mr. Garcia, George Steele, responded, arguing that admission of such evidence should be denied on several grounds, including that RCW 10.58.090 violated the Separation of Powers Doctrine and that, under ER 404(b), the evidence was not permitted because it was (a) separated by a considerable amount of time, (b) was not in any way unique, and (c) did not exhibit a common scheme or plan. RP 33-42 (8/1/2011). Moreover, Mr. Steele specifically requested that Judge Hogan "go through the analysis of 404(b) and find that [the other sex offense evidence is] not admissible ..." RP 41 (8/1/2011). The State also requested an ER 404(b) balancing test be performed by the judge "on the record." RP 46 (8/1/2011).

The trial court admitted the evidence under both RCW 10.58.090 and under ER 404(b). RP 46 (8/1/2011); CP 228-29. The court also signed an order

admitting the evidence. CP 228-29. As it related to admission under ER 404(b), Judge Hogan stated the following:

> Certainly under 404(b) evidence of other misconduct, and the Court does note that these are not charges or convictions. But evidence of other misconduct for purposes other than proof of general character is admissible. The other purposes offered by the State include the opportunity, intent, preparation, absence of mistake, or accident in terms of the similarity of the offense or the touching between Lorraine and Lorena both going for a period of approximately ten years, ending when each of the girls were 13 or 14. The similarity of the types of offense or touching, fondling, kissing, over the clothes, similarity of the words, both the similarity in positions of trust and influence over both girls, despite the testimony that appears to be consistent that Mr. Garcia was fun to be with.
>
> Factor B, closeness in time. That has a variety of interpretations. In this case, the interpretation is the age when the alleged offenses began and when they terminated, rather than the closeness in time between Lorraine and Lorena's alleged touching.
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> The frequency from the offer of proof appears to be very consistent in terms of the frequency and type. Intervening circumstances in the case of Lorraine: Went off to the Military when she was 18 and returned to this area.
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> The necessity of the evidence, the Court certainly agrees, Mr. Steele, the information is prejudicial. The necessity of the evidence is probably the most compelling in these types of cases because these types of cases present with no forensics, no medical evidence, no witnesses. In Mr. Garcia's case, there are no convictions. But the Court finds that the probative value substantially outweighs the clear prejudice to the defendant.

RP 46-47 (8/1/2011).

Prior to opening statements, the State moved to amend the information to three counts of child molestation in the first degree. RP 56 (8/3/2011). On August 8, 2011, Mr. Garcia was found guilty on all three counts. RP 369-372 (8/8/2011).

B. Facts

Mr. Garcia, appellant herein, is a 26 year veteran of the United States Armed Forces – reaching the rank of Sergeant Major. RP 258-59 (8/4/2011). He joined the armed forces after being drafted and sent to Vietnam, where he was wounded. RP 258 (8/4/2011). Following his military career, Mr. Garcia went to work for the Washington State Department of Corrections where he worked for more than 20 years. RP 258 (8/4/2011). During this time, Mr. Garcia had a daughter named Lorraine. RP 259 (8/4/2011).

Lorraine always wanted to please her father and the family was very close. RP 137, 152 (8/3/2011). Lorraine described her family life as "good" and "happy." RP 152 (8/3/2011). When Lorraine graduated from Military Basic Training, she felt Mr. Garcia was proud of her. RP 137 (8/3/2011). As such, Lorraine spent a great deal of time with her father and freely permitted him to spend time with her kids – his grandkids. RP 137 (8/3/2011). In fact, Lorraine allowed her children to spend the night with their grandfather roughly three times per month. RP 74 (8/2/2011).

As it related to his time with his grandchildren, by all accounts, Mr. Garcia was a loving grandfather. RP 302 (8/8/2011). He would spend time with his grandkids, playing baseball, shooting pool or playing cards. RP 255 (8/4/2011). Specifically, he had a wonderful relationship with his granddaughter, Lorena – the alleged victim in this case. RP 254 (8/8/2011). When asked to describe her time with her grandfather, Lorena stated, "[i]t was fun." RP 75 (8/2/2011).

Despite the closeness of the family and the freedom by which Lorraine allowed her own daughter Lorena to visit Mr. Garcia, ultimately, both Lorraine and Lorena alleged that Mr. Garcia sexually abused them. RP 76-89 (8/2/2011); 130-135 (8/3/2011).

Lorraine's allegations were as follows:

- When she was four years old Mr. Garcia performed oral sex on her and forced her to perform oral sex upon him. RP 131 (8/3/2011).

- On a road-trip to California, Mr. Garcia penetrated her vagina with his fingers. RP 134 (8/3/2011).

- "Any time he got a chance when [they] were alone" Mr. Garcia would touch Lorraine's vagina "under the clothes" and Mr. Garcia would make Lorraine "touch him." RP 135 (8/3/2011).

- Mr. Garcia "made [her] kiss him one time." RP 135 (8/3/2011).

Lorena's allegations were different. She alleged the following:

- She was called into Mr. Garcia's bedroom and told to "get on top of him" and made to grab his penis *over* his pajamas. RP 76 (8/2/2011).

- She was laying and watching a movie when Mr. Garcia "stuck his hands down [her] pants" – without penetration. RP 76 (8/2/2011); RP 120 (8/3/2011).

- Mr. Garcia twice touched her breasts "over the clothes" when she was "about ten." RP 86, 88, 91 (8/2/2011).\

- Mr. Garcia would kiss her "every time [he] saw [her] or ... was alone with [her]." RP 87 (8/2/2011).

At trial, Mr. Garcia adamantly denied the allegations. RP 250 (8/4/2011). Additionally, Mr. Garcia never suggested, as a defense, that he inadvertently contacted Lorena in a manner that might have been mistaken as sexual, nor that

she might have mistaken innocent contact as abuse or any other type of defense except general denial of the allegations. See Transcripts Generally.

IV. ARGUMENT

As noted above, at trial, the state sought to introduce evidence – under RCW 10.58.090 and ER 404(b) – that Mr. Garcia had previously engaged in inappropriate contact with his own daughter. The trial court allowed the evidence over Mr. Garcia's objection. RP 47 (8/1/2011). Because the Supreme Court recently declared RCW 10.58.090 unconstitutional in State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012), admission of evidence under that statute constitutes reversible error. Furthermore, because the trial court also improperly admitted the evidence under ER 404(b), respectfully, this Court must reverse Mr. Garcia's conviction and remand his case for new trial.

A. The trial court erred when it allowed the introduction of uncharged prior sex offense evidence to be admitted under RCW 10.58.090.

In Gresham, supra, the Washington State Supreme Court declared RCW 10.58.090 – which allowed admittance of evidence of prior sexual misconduct – unconstitutional. Here, because the trial court allowed the evidence under both RCW 10.58.090 and ER 404(b), reversal is required unless the trial court's decision to allow the evidence can survive the following ER 404(b) analysis.

B. The trial court erred when it failed to properly analyze ER 404(b) and allowed the State to improperly introduce inadmissible character evidence – in the form of uncharged sexual misconduct allegations – against Mr. Garcia.

Evidence Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b).

Moreover, acts offered to demonstrate a person's general propensities must be excluded – even if the acts themselves are relatively benign and would not, by themselves, cause the jury to be prejudiced against the person in question. State v. Everybodytalksabout, 145 Wn.2d 456, 39 P.3d 294 (2002). This rule bars more than acts that are illegal, unpopular, or disgraceful – it also forbids evidence of any other acts offered to show a person acted in conformity therewith. Id. In Gresham, the Court clarified the rule:

> Properly understood, then, ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character. Id. ("In no case, ... regardless of its relevance or probativeness, may the evidence be admitted to prove the character of the accused in order to show that he acted in conformity therewith." (emphasis added)). Critically, there are no "exceptions" to this rule. 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 404.9, at 497 (5TH ED. 2007). Instead, there is one improper purpose and an undefined number of proper purposes. Though the other purposes are sometimes referred to as exceptions, this is simply legal shorthand for "other purposes." In most circumstances, this shorthand is of no consequence and creates little risk of misunderstanding. Only when the term "exception" is read out of context and the plain text of ER 404(b) is ignored does the possibility of confusion arise.

Gresham, supra at 421.

In analyzing whether evidence of prior crimes, wrongs or acts is admissible, Washington Courts have developed a thorough analytical structure.

Id. "To admit evidence of a person's prior misconduct, 'the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.'" Id. (*citing* State v. V. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)(*citing* State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995))). The last two elements exist to ensure that the evidence does not violate ER 402 or ER 403, respectively. Gresham, supra at 421. "The party seeking to introduce evidence has the burden of establishing the first, second, and third elements ... [and] it is because of this burden that evidence of prior misconduct is presumptively inadmissible." Id (*citing* DeVincentis, 150 Wn.2d at 17; Lough, 125 Wn.2d at 853.)

As it relates to sex cases, the State's burden in attempting to admit the evidence is even higher. See State v. Sutherby, 165 Wn.2d 870, 886, 204 P.3d 916 (2009) ("We have previously cautioned about the admissibility of other sex crimes, warning that '[c]areful consideration and weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its highest.'" State v. Coe, 101 Wn.2d 772, 780-81, 684 P.2d 668 (1984)). In cases where admission of the evidence is a close call, "the scale should be tipped in favor of the defendant and exclusion of the evidence." State v. Smith, 106 Wn.2d 772, 775, 725 P.2d 951 (1986). Interpretation of evidence rules is a question of law, which is reviewed *de novo*. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

Here, the State moved to admit uncharged evidence that Mr. Garcia had previously molested his daughter under ER 404(b). RP (8/1/2011) 30. In support of its motion, the State argued the alleged acts were similar in terms of (a) the ages of both girls when they were molested, (b) the type of contact Mr. Garcia had with each girl, and (c) the position of authority Mr. Garcia held over them. Id. As it related to admission under ER 404(b) the above arguments constituted the effective totality of the State's oral argument. Id.

Nonetheless, as noted above, the trial court admitted the evidence under ER 404(b), stating:

> Certainly under 404(b) evidence of other misconduct, and the Court does note that these are not charges or convictions. But evidence of other misconduct for purposes other than proof of general character is admissible. The other purposes offered by the State include the opportunity, intent, preparation, absence of mistake, or accident in terms of the similarity of the offense or the touching between Lorraine and Lorena both going for a period of approximately ten years, ending when each of the girls were 13 or 14. The similarity of the types of offense or touching, fondling, kissing, over the clothes, similarity of the words, both the similarity in positions of trust and influence over both girls, despite the testimony that appears to be consistent that Mr. Garcia was fun to be with.
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> medical evidence, no witnesses. In Mr. Garcia's case, there are no convictions. But the Court finds that the probative value substantially outweighs the clear prejudice to the defendant.

RP 46-47 (8/1/2011).

In this case, first, it was error for the trial court not to analyze whether to admit the prior allegations of misconduct in the manner set forth in Gresham, Thang and Lough. Specifically, the trial court never made any finding – by a preponderance of the evidence – that Mr. Garcia actually abused Lorraine. The court simply took the State at its word as to what Lorraine would testify about and then allowed her to testify. This was error and grounds for reversal, especially considering the state's representations that the allegations from Lorraine and Lorena were similar – since they were not. See argument below.

Second, while the trial court did attempt to identify the purpose for which the evidence was sought to be introduced and its relevance, it failed to properly understand the "exceptions" to ER 404(b) by conflating them with what is more aptly defined as the "probative value," of the evidence.

Specifically, the trial court allowed Lorraine's testimony as evidence of "opportunity, intent, preparation, absence of mistake, or accident." This was error where the State failed to make a showing as to the necessity of the evidence to overcome a related aspect of Mr. Garcia's defense. In other words, because Mr. Garcia did not contend that he was without the "opportunity or intent" to abuse Lorena, admission of Lorraine's testimony to "overcome" that defense was not warranted. Similarly, at no point did the defense suggest that the contact between Mr. Garcia and his granddaughter occurred but was "accidental" or some type of

"mistake." If the defense had made such a claim, the evidence of prior misconduct might be probative to show the absence of such, etc. As it was, however, the State argued and the trial court concluded that because the allegations (1) were similar, and because (2) sex cases without forensic evidence are difficult to prove, the prior misconduct evidence was admissible under ER 404(b). This conclusion was erroneous.

In Sutherby, the Washington Supreme Court reversed a conviction for rape and child molestation where the State was allowed to present evidence that the defendant possessed child pornography. Sutherby, 165 Wn.2d at 887. That case involved an ineffective assistance of counsel claim where the defense attorney had failed to seek severance of the charges of rape/child molestation from a charge of possessing child pornography. Id. at 874. The Court stated:

> Fourth, had the possession of child pornography charges been severed, it is highly likely that evidence of Sutherby's possession of the child pornography would have been excluded in a separate trial for child rape and molestation. The State argues that such evidence is admissible to show the absence of mistake or accident. However, the few cases in which evidence of possession of pornography was allowed in a trial for sexual assault involved pornography evidence that was used to show a sexual desire for the particular victim. As offered here, the evidence would merely show Sutherby's predisposition toward molesting children and is subject to exclusion under ER 404(b).

Id. at 923-24 (internal citations omitted)(emphasis added).

Mr. Garcia's case is no different in that the State used allegations from Lorraine to support Mr. Garcia's sexual desire *for a different victim*, Lorena. The Court in Sutherby rejected the notion that such evidence was allowable under ER 404(b).

The State will likely argue that the "similarities" between the allegations suggest Mr. Garcia's participation in a "common scheme or plan." Respectfully, such an argument should be rejected for two reasons. First, "common scheme or plan" was not stated by the trial court as the grounds by which the evidence should be admitted. Second, at no point did the State allege that Mr. Garcia engaged in any conduct so as to "trap" or "trick" either Lorraine or Lorena in a manner that would make them more susceptible to misconduct. The State must not be allowed to conclude that simply because the girls were both "between the ages of 4 and 14" and because some of their allegations were similar[1], that such constitutes a "scheme or plan." The reality is that these "similarities" evidence nothing more than a propensity for molestation of young girls – exactly the type of character evidence forbidden by ER 404(b).

Additionally, as is noted above, the acts allegedly committed upon Lorraine and Lorena were not "similar" to each other – rather, they were only similar to the average claim of child molestation. Specifically, Lorraine alleged that Mr. Garcia performed oral sex upon her – Lorena never made such an allegation. Lorraine also alleged Mr. Garcia would have her perform oral sex on him – again, Lorena never made such an accusation. Lorraine testified that Mr. Garcia digitally penetrated her vagina – Lorena alleged vaginal touching, without penetration. Lorraine alleged that any time she was alone with Mr. Garcia, the improper touching occurred, but that Mr. Garcia only inappropriately kissed her once – Lorena stated these allegations the other way around; the touching only happened a few times, but the kissing occurred every time they were together.

[1] Appellant contends the allegations were not similar.

In reality, the only similarity in the conduct was that both alleged victims were between the ages of 4 and 14 when the conduct occurred and that both were related to Mr. Garcia. Respectfully, these similarities do not constitute a "common scheme or plan" or any other "exception" to ER 404(b). The evidence was only admitted to show Mr. Garcia's alleged propensity for molestation and, thus, to make the State's case easier to prove. The trial court referred to this factor as "the necessity of the evidence," when it stated the following: "The necessity of the evidence is probably the most compelling in these types of cases because these types of cases present with no forensics, no medical evidence, no witnesses."

Respectfully, because "necessity of the evidence" is not an authorized exception to ER 404(b), and because the admission of the evidence in this case was as prejudicial and as unrelated as the child pornography evidence in Sutherby, the trial court erred in admitting it and this Court should reverse Mr. Garcia's conviction.

V. CONCLUSION

Based on the above cited rules, files and authorities, Mr. Garcia respectfully requests that this court reverse his convictions in this case and remand the matter for new trial.

Dated this 24th day of April, 2012.

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CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the opening brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Deputy Prosecuting Attorney
946 County-City Building
Tacoma, WA 98402

Robert Garcia Jr.
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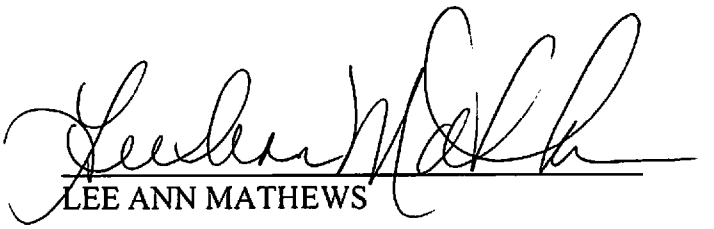
Shelton, WA 98584

Signed at Tacoma, Washington, this 24th day of April, 2012.



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